No. 10,571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION PAVING CO. (a corporation), PACIFIC INDEMNITY COMPANY (a corporation) and MARYLAND CASUALTY COMPANY (a corporation),

Appellants,

vs.

UNITED STATES OF AMERICA, for use and benefit of Soule Steel Company (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Since (App. Br. 22-27) appellants' point one and point four (App. Br. 35-48) relate to the interpretation of the contract, we will reply to these two points as a unit, and will then deal separately with points two and three.

(NOTE): For convenience, appellee Soule Steel Company will be referred to herein, as subcontractor, Steel Company, or plaintiff, and appellants Union Paving Co., Pacific Indemnity Company, and Maryland Casualty Company will be referred to as Union Paving Co., Paving Co., or defendants.

All emphasis is supplied unless otherwise noted.

References to pages of the Transcript of Record are indicated thus: (Tr. p.) and to Appellants' Opening Brief (App. Br.).

REPLY TO POINTS ONE AND FOUR.

The question voiced in appellants' points one and four, upon which the parties are in violent conflict is —the interpretation, construction and meaning of their contract.

The trial court after examining the contract and after the taking of evidence in finding VIII (52) found

> "The Court finds that said contract is uncertain, ambiguous and indefinite in that it does not clearly and certainly appear therein whose duty and obligation it was to so erect and pay the cost of the erection of said falsework, scaffolding and interior framework in said abutment No. 1 and in said piers."

If this finding is justified, then the appeal urged by appellants in points one and four is without merit.

A.

CONFLICTING CONTENTIONS AS TO THE MEANING OF THE CONTRACT.

Although parol evidence is not admissible to vary the terms of a written contract, appellant appreciating that nevertheless it is admissible to explain uncertainties and ambiguities, claim the contract was unambiguous and provided as follows:

> "We therefore conclude that we have illustrated the contract was unambiguous and provided that Union Company was to do the falsework and interior framework on the cores of the piers which it did and charged itself for this work and

> that Soule Steel Company, because of the nature of its work had to, above the foundation lines, build falsework and interior framework to put up the reinforcement bars." (App. Br. 48.)

Appellant reached this conclusion in the following manner: In the heading of point one (App. Br. 22) they state the steel company was to pay for *all* of the temporary framework in the piers and abutments. They refer to section 66 of the general contract which requires the contractor to so place and secure the reinforcing bars in position, that they will not be displaced during the pouring of the concrete. (App. Br. 22-26.) They also point to other language in sections 24 and 45 of the general contract requiring the contractor to provide mechanical devices to hold the reinforcing bars in place during the pouring of the concrete.* Nothing is said in either sections 24, 45 or 66 of the general contract as to the manner in which the reinforcing bars should be secured in place; likewise, there is nothing in the subcontract which in any way describes or delineates the type of structure that should be erected to hold the reinforcing bars in place. Both the general contract and the subcontract are silent on this subject.

Since, under the contract, the paving company was required to construct the wooden cores in the two

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*No point is made by appellants that the Steel Company did not provide these mechanical devices, the appeal being limited to the falsework, scaffolding and interior framework. Soule testified at length as to what was done in providing and installing these mechanical devices (101-104).

larger piers, appellant combined this provision with the general requirements of section 66 and reached the foregoing conclusion as to the meaning of the contract. The claim that the contract required the steel company to erect all of the framework, except around the cores, is not supported by any specific language found in the contract, because there is none, but is attempted to be based on the doctrine of *expressio unius est exclusio alterius.* Appellants say

> "If it were not intended under the subcontract that the Soule Company was not to build the falsework and interior framework, there was no reason to state that where there were cores in the piers that Union Co. would undertake to build those, and which structures could then be used by Soule to support the reinforcement bars. If Union Co. were supposed to build all the falsework and interior framework, what would have been the purpose of incorporating the section of the contract last quoted?" (App. Br. 27.)

Appellants, however, studiously avoid any mention of one very vital provision of the contract which reads as follows:

> "the subcontractor agrees that it will proceed with the placing of the reinforcement bars in sections of the piers and abutments made ready for such placement immediately after being notified by the contractor of the readiness of each section."

The above clause required the paving company to make the *sections* of the piers and abutments ready for *placement.* Nowhere in either contract is there

any definition of the meaning of *sections* of piers or any statement of what the paving company was required to do in order to make these sections *ready for placement*. Both contracts are silent.

Soule maintained that his original bid had contemplated modes of support other than an interior framework and that the promise of the right of free support had greatly reduced his original bid price. He claimed that after negotiations, an understanding was reached by the parties that the paving company was to erect the falsework and interior framework for the primary purpose of pouring concrete and that Soule would be entitled to use it without cost for the secondary purpose of supporting the reinforcing steel. Soule claimed that the clause requiring the paving company to make the sections of the piers ready for placement meant that the paving company would erect this interior framework, which could be used by the steel company for placement of the steel.

After taking evidence the trial court found in regard to this clause

> "The Court further finds that the plaintiff at the time of the execution of the agreement of January 6, 1940, understood the following provision contained therein:
>
> (Here appears the contract clause previously quoted) to mean and the Court hereby finds it did mean that said defendant, Union Paving Co., would erect and pay for the cost of the erection of said falsework, scaffolding and interior framework, and that plaintiff would have the right to

> use the same without cost to support, place and secure the reinforcing bars. That said defendant, Union Paving Co., at the time plaintiff executed and signed said agreement of January 6, 1940, knew that the plaintiff understood the foregoing provision of the agreement in the manner above set forth." (Tr. p. 53.)

In order to understand this finding and the conflict between the variant contentions of the parties, one has to be cognizant of the evidence which was admitted both prior and subsequent to the criticized ruling of the trial court. Appellants in their brief fail to state any of the evidence thereby placing upon us the burden of relating it. In stating the evidence we will point out how it has forced the appellant on this appeal to take first one contrary position after another, each of which is contrary to their interpretation of the contract, even forcing them to admit that no agreement was ever reached upon the very subject matter in regard to which they now claim the contract is clear and unambiguous.

B.

THE EVIDENCE WHICH PRECEDED THE CRITICIZED RULING OF THE TRIAL COURT, TOGETHER WITH THE STATEMENTS AND ADMISSIONS FOUND IN APPELLANTS' BRIEF CONCLUSIVELY ESTABLISH THAT THE FINDING OF THE TRIAL COURT THAT THE CONTRACT WAS UNCERTAIN WAS AMPLY JUSTIFIED.

1. THE EVIDENCE.

(a) The defendant set up its cost records and books of account in accordance with Soule's interpretation of the contract.

Before the job commenced and at or about the time of the contract, the paving company set up a system of keeping costs. (Exhibit 16, pp. 216-220.) Accounts Nos. 7, 8, 9 and 10, covered the costs of the concrete in the piers and abutments, and particularly "Account No. 9" covered the concrete in Piers No. 1-7. "Above Top of Bases." Each one of these four accounts had thirteen sub-headings, among which were sub-item 1—"Forming"; sub-item 3—"Build Falsework"; and sub-item 4—"Build Runways". Account No. 11 was for "Reinforcing Steel (Sub-contract)." Mr. Loren Hunt, the cost engineer for the paving company, testified that acting under instructions of Mr. Dowling and Mr. Cochrane (respectively the manager and superintendt of the paving company), that when he, Hunt, opened up the cost record keeping he charged all of the costs now in controversy to the concrete and none of it to item No. 11 which was the reinforcing steel account. (Rep. Tr. pp. 221, 259, 260.) Labor costs as shown by the daily time sheets and summaries (Exhibits I and J) were charged in the same manner. Furthermore, the dis-

puted costs were carried on the general books of account of the paving company up until October 15 as a part of the cost of the paving company's part of the job and no charge was made against Soule. (Testimony of Dowling, Tr. pp. 304, 305.) The paving company thus set up their own cost records and their general books of account in exact accordance with Soule's version of the meaning of the contract, and exactly contrary to the present claims of the appellant.

(b) The paving company purchased the material and paid for the labor in constructing the framework without consulting with the steel company and never made any demands of the steel company that they construct the framework.

During the progress of the job, up to October 15, the paving company built and constructed this falsework and framework and in doing so paid the wages of the men, bought and paid for all the materials which were used, did not consult with the steel company either in regard to the purchase of these materials or the price that should be paid, nor in regard to the manner in which this construction work should be carried on. (Dowling, Tr. p. 305.) During the same period the paving company did not make any demand that Soule install any of this falsework or framework. (Dowling, Tr. pp. 302, 303.)

(c) The steel company for a period of six months rendered bills for the steel erected and the paving company paid the bills without objection and without any claim of offset.

The placing of the steel commenced in March 1940 and beginning on March 31, 1940 Soule in accordance

with the contract rendered monthly statements to the paving company showing the amount due for the steel placed during the preceding month. (Plf. Exs. 1-6, Tr. pp. 80-84.) On the monthly bills the paving company paid $5000.00 in July; $12,486.25 in August and on September 21, 1940—$9126.04; or a total of $26,612.29, which practically paid the contract in full on the monthly billings that had been rendered up to that time. Dowling testified (Tr. p. 303):

"Q. That practically paid your contract in full.

A. Up to that time.

Q. On the monthly billings that had been rendered to that time.

A. Yes."

Up to October 15 no objections were voiced by the paving company as to the amount of these monthly billings nor was any claim ever advanced by the paving company that these monthly statements did not correctly represent the amount which was then owing to the steel company or were subject to off-set. (Dowling, Tr. p. 302.)

(d) Ten months after the contract was signed the paving company for the first time made a claim that there was any obligation on the steel company to erect the framework.

The September billing was rendered September 30. (Plf. Ex. 7, Tr. p. 85.) This billing had not been paid two weeks later, on October 15. From this time onward the paving company made no further payments until January 18, 1941, when they paid $20,000.00. (95.) At the time of the completion of the

job, according to the final monthly billing (89), as per the statement rendered July 15, 1941 (Plf. Ex. 12, Tr. pp. 93, 94 and 95), the paving company was indebted to Soule in the sum of $77,352.62. Six and one-half months after the job was completed, on December 31, 1941, the paving company paid an additional $16,000.00 (59) which reduced the account to $61,352.62, which is the amount now in dispute.

All of the pertinent portions of the evidence summarized in subdivisions a, b, c and d are ignored in appellants' brief, reference being made solely to the billings by Soule, the amounts paid, and the cessation of monthly payments.

(e) The managing head of the paving company testified that no agreement was ever reached in regard to the framework.

Dowling who negotiated and executed the contract, testified directly, positively, and unequivocally that no agreement ever existed in regard to the framework:

> "Mr. Dowling. A. I asked him (Stevens) to sit down with us and adjust or come to some agreement of how the charges for the interior structure should be apportioned. He said he would take it up with San Francisco. Nothing happened until along about in September, again.
>
> Mr. Moore. Q. Of the same year?
>
> A. The same year. The same thing happened with no results. So I told him we would pay no more money for that work until such time as we could get a settlement or some adjustment of some type." (Tr. pp. 278, 279.)

"Mr. Wrigley. Q. Going back to the request of July, give us the substance of what you said, and what his reply was.

Mr. Dowling. A. Well, I said to Mr. Stevens, *'Don't you think it is about time now that we ought to get together and agree on how to apportion our respective costs for the interior framework?'* " (Tr. p. 296)

the September conversation:

"Mr. Dowling. A. *I asked him if he made up his mind or determined how we should split the charges, and he said he had not.* And then I said that we would be compelled under the circumstances to withhold payments beyond that time *until some definite understanding had been made,* those payments to cover the approximate cost of his share of the work." (Tr. p. 297.)

(f) The cost engineer revised his records in order to set up the basis of the present cross-complaint.

On October 12 Hunt received a letter from the San Francisco office of the paving company (Pl. Ex. 14, Tr. p. 260) and shortly thereafter received the following instructions:

"Mr. Moore. Q. After you received that, did you receive any further instructions as to what you should do?

A. Yes.

Q. What were those?

A. To go back through the records—first, to continue and distinguish between internal falsework as we progressed, and that was set up, and we had three shifts of timekeepers eventually set

up, and I think the first date was about the end of October when that was carried and put in effect." (Tr. pp. 260, 261.)

(g) The cost engineer adopted an arbitrary division of costs.

The first of these revamped charges was completed on November 28, 1940, and the second one on January 14, 1941, Hunt testifying as follows:

"A. That covered piers—November 28th—summary of materials that went into the construction of the steel supports and falsework of piers 2, 3, 4, 5, and 6 up to the time we started to take an accurate account of the materials used.

Q. In other words, you went back over the records which had previously been charged to pouring concrete and took these figures from them?

A. Yes, and also a print we made of the typical sketch—a typical sketch of the typical layout.

Q. After taking this out of the other charges, these are included in the bill that is now rendered against Soule?

A. That is right.

Q. Will you tell us the next date?

A. January 14, 1941.

Q. That is a letter by yourself to the home office, is it?

A. Yes. 'Enclosed is a summary of the materials that went into the construction of the steel supports and falsework for Piers 1 and 7.'

Q. That was compiled in the same manner, was it?

A. In the same manner, yes." (Tr. p. 262.)

(h) By this arbitrary division the paving company charged the steel company with approximately two-thirds of the cost of the framework.

This revamping of the cost records by Hunt is the basis of the $61,112.62 claimed in the cross-claim.

The manner in which Hunt divided the charges between the paving company and the steel company was explained by Hunt.

> "Q. You drew a distinction between whether it was supported on the inside framework or whether it was supported on the outside forms, is that correct?
>
> A. The distinction can be stated a little differently, but that is all right." (Tr. p. 258.)

As a result of Hunt's work a bill was subsequently rendered Soule (Ex. K, Tr. p. 205) which purported to cover Soule's share of the cost of the temporary support in Piers 1-7 inclusive and abutment #1. No charge was made against Soule for piers 8, 9, and 10 nor abutments 2, 3, and 4. This more fully appears in the division of cost prepared by the paving company:

TOTAL COST OF CONSTRUCTING SUPPORTS FOR REINFORCING STEEL, TEMPLETS, SPACERS, FALSEWORK, RUNWAYS, etc. for use in Piers and Abutments—Pit River Bridge.

Chargeable to Union Paving Co.:

Runways:		Labor	Material	Total	Falsework:	Labor	Material	Total
Abutment	1	$ 1,729.54						
	2	731.17				$ 1,098.31		
Pier	1	1,507.01						
	2	3,963.64						
	3	6,417.05				4,159.57		
	4	4,828.23				1,726.43		
	5	2,517.63	$ 5,268.55				$ 3,149.90	
	6	2,210.02				166.70		
	7	1,092.18						
Abutment	3	2,187.22				1,233.59		
Pier	8	1,880.84				826.24		
	9	1,273.06				417.69		
	10	1,817.58				420.58		
Abutment	4	640.21				376.86		
Totals		$32,795.38	$ 5,268.55	$38,063.93		$10,425.97	$ 3,149.90	$13,575.87
								38,063.93
								$51,639.80
10% Supervision								5,163.98
							Total	$56,803.78

Chargeable to Soule Steel Co.:

Temporary Supports		Labor	Material	Total		
Abutment	1	$ 2,905.64	$ 380.28	$ 3,285.92		
Pier	1	784.71	125,52	910.23		
	2	5,358.26	2,781.75	8,140.01		
	3	13,263.77	5,332.02	18,595.79		
	4	8,417.89	4,732.63	13,150.52		
	5	2,478.63	1,059.17	3,537.80		
	6	2,457.19	493.61	2,950.80		
	7	2,185.00	730.49	2,915.49		
Totals		$37,851.09	$15,635.47	$53,486.56		
10% Supervision				5,348.66	$58,835.22	
Miscellaneous Charges						
Moving & Repairs to Boom				$ 1,893.82		
Additional Miscell. Charges				383.58	2,277.40	
						Total $61,112.62

[Pencil Notation]:

56803.78

61112.62

Total 117,916.40

[Endorsed]: Filed 4/9/43.

An analysis of the foregoing segregation of costs is interesting. Since Soule was charged for a portion of the cost in only eight piers and abutments, we have therefor printed in red ink in the copy of Ex. X printed herein those items on these eight piers and abutments with which Union have charged itself, and they total $38,736.45. Union charged Soule $53,486.56 as its share of the cost. It thus appears that the actual construction cost for the framework on these eight piers and abutments amounted to $92,223.01 of which Soule was charged approximately 58%. In addition to charging Soule with his share of the actual cost they charged Soule with a 10% supervision cost amounting to $5348.66, or a total of $58,835.22. It is true that Union charged itself with a 10% supervising fee, but this is mere bookkeeping, and not actual money. Therefor, if they collected from Soule the 10% supervising fee charged him, it reduced the actual cost to Union a like amount, making the total paid by them $33,387.80. Therefor, of the actual cost of construction Soule would be paying approximately 66⅔% and the Union 33⅓%. In addition Hunt admitted that the $3,285.92 charged to Soule for abutment #1 was heavily padded. (Tr. pp. 243-246.)

The Dowling-Stevens conference, and the revamping of the accounts by Hunt could not be ignored by appellants and is reflected in their opening brief.

2. **INCONSISTENCIES AND CONTRADICTIONS IN APPELANTS' OPENING BRIEF CAUSED BY THE TESTIMONY PREVIOUSLY OUTLINED.**

Although appellants contend that the contract required Soule to erect or pay the cost of erection of *all*

the falsework and interior framework in *all* of the piers and abutments (except the framework above the cores), nevertheless, they admit that Soule was not charged for the falsework and interior framework in *all* of the piers and abutments but was charged for the falsework and interior framework *in only a part of the piers and abutments,* in that no charge was made against Soule for falsework or temporary supports in abutments Nos. 2, 3, and 4, or piers 8, 9, and 10.

> "No charges were made against Soule for falsework or temporary supports on abutments 2, 3, and 4 or piers 8, 9, and 10. (286, 287, 302.)
>
> These abutments and piers were smaller units and the reinforcement bars were placed in position and rested on rock base or concrete curbs or sills and were self-supporting. They required no welding or falsework to support them.
>
> This case concerns the reinforcement bars placed in abutment 1 and piers 1, 2, 3, 4, 5, 6, and 7. The reinforcement bars used in these piers are about 2″ square and in 60-foot lengths and weighing approximately 900 pounds, required welding and falsework or interior framework to support them as they were placed in a variable oblique or sloping position."
>
> (App. Br. 7.)

No language of the contract can be pointed to which, in the slightest way, indicates why Soule was to pay for the temporary supports in eight of the fourteen piers and abutments, or why the paving company was to pay for the temporary supports in the other six

abutments and piers. The only explanation found in appellants brief is—that the six piers and abutments for which no charge was made were smaller and the type of construction was different from that for the eight for which charge was made. No language in the contract can be pointed to, which justifies Soule's being charged for the framework in certain piers and abutments and not for others.

Soule not only was not charged for *all* of the falsework and interior framework in *all* of the piers and abutments, but was charged for only a portion of the cost of the falsework and framework in abutment No. 1 and piers 1, 2, 3, 4, 5, 6 and 7.

> "The total cost of constructing the falsework was $117,916.00. (286, 287.) Of this sum Union Paving Co. charged itself with the amount of $56,803.00 and charged to Soulé $61,112.00 (287)."

Soule was therefore not charged for any of the cost in six piers and abutments but according to appellant was charged for only slightly over half of the cost of the construction of the falsework and interior framework in all of the piers and abutments.* Nowhere in the contract is there any provision which provides for a division of the cost of these eight piers and abutments, or any provision that Soule should bear some proportionate share of this cost.

Furthermore appellants admit that no such agreement was ever reached in regard to this sharing of costs, and that therefor since no agreement existed

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*As previously pointed out actually Soule was being charged approximately 66⅔% of the cost of the eight piers and abutments.

the paving company took upon itself to arbitrarily divide the costs of the erecting of this interior framework, making this division without consulting the steel company, and having done so, deliberately withheld the amount which it had arbitrarily assessed against Soule.

Appellants say:

> "When Union, through J. A. Dowling, its manager, was unable up to October 15, 1940, *to reach an agreement* with Mr. Stevens, the partner and representative of the Soule Company, at the place of construction, *as to the proportion of cost for falsework,* Union then set up its books in a more than equitable fashion, charging the cost of all the falsework and interior framework which it had constructed and paid for on the equitable basis of $56,803.00 to Union Paving Co. and *$61,112.00 to Soule Steel Company.* (Exhibit Y, 286, 287.) No charges were allocated against Soule for abutments 2 and 4, or piers 8, 9, and 10."
>
> (A. B. 27.)

This statement negates and destroys the fundamental premise of the appellants' appeal. If Union "was unable up to October 15, 1940, to reach an agreement", then no agreement had, up to that time, been reached. If there was no agreement, then by what right, or under what term of the contract, did Union divide the cost in a manner which they thought was equitable by charging approximately 33⅓% to Union and 66⅔% to Soule? If a definite and unambiguous agreement existed, why should Union, nine

months later, be trying to reach an agreement on the same subject matter? What provision of the contract can be pointed to which provides that the cost of construction should be divided equitable? Particularly, what provision of the contract is there, which would permit the paving company to act as the judge of what would be an equitable division, and charge Soule 66⅔% of the actual cost?

It thus appears from the appellants' own statements: that in construing the contract they have ignored an important provision of the contract which the trial court interpreted adversely to them; that they arrived at an interpretation favorable to themselves by deduction rather than by reference to any unambiguous language; that they admit that the sum withheld and now in dispute bears not the slightest relation to their interpretation of the contract; that they affirmatively aver that no agreement was ever reached upon the very subject upon which they now claim the contract is unambiguous; and, finally they state that because of such lack of agreement they took upon themselves to divide the cost in a part of the piers in a manner which they considered equitable. How, in the face of such a record, appellants can seriously contend that the contract is unambiguous passes understanding.

C.

THE DISPUTED RULING AND THE TESTIMONY INTRODUCED AS A RESULT THEREOF.

With the evidentiary record in the shape, we have already outlined, the following question was asked Mr. Dowling and the following objection was made (Tr. pp. 305-306 (d)):

> "Q. As a matter of fact, on December 29, 1939, did you not have a conference at the office of the Soule Steel Company with Mr. Cochrane, who was then your superintendent, Mr. Stevens and Mr. Soule?
>
> Mr. Wrigley. I object to that as incompetent, irrelevant, and immaterial, and an attempt to go back over a written contract, which is prevented by Section 1625 of our Code. The parties agreed to a writing, in which the obligations of each party were stated. An attempt to reopen that in order to vary the contract I say is objectionable."

In the argument of counsel which followed (306-320) the evidentiary record was reviewed, the terms of the contract discussed and practically the same arguments were advanced by the defendant as are to be found in their brief, after which the objection was overruled.

The evidence which was subsequently introduced was so convincing that it would have justified the reformation of the contract if it had been contrary to Soule's contentions.

(1) SOULE'S TESTIMONY.

Soule says that on October 4, 1939, which was the day before the bids were opened by the United States Government, that he and Ross Mahon (Soule's engineer), had a conference with Dowling at the Senator Hotel in Sacramento. At that time they gave him what was known as a going-in bid which bid included the cost of supporting devices. (Tr. p. 372.) Mahon corroborates Soule, stating the bid was $33.82 a ton. (Tr. pp. 229, 230.) Soule says that after this first meeting he and Mahon were constantly in contact with Dowling. That he got a copy of the plans and specifications from the government and sent them to his Los Angeles office and had a check estimate made and that the Los Angeles office also made up a large scale drawing of pier No. 3 showing the reinforcing bars, as to where they were located in the pier and where the bars lapped and weld. This large scale drawing is marked Pl. Ex. 22, for identification (Tr. p. 374), and was subsequently admitted in evidence. (Tr. p. 387.) Soule says he had several talks with Alex Cochrane (Dowling's superintendent), and Cochrane asked him how he expected to support the reinforcing bars, and Soule told him he intended to erect what is called a structural triangle to the slant of the bars, plus a supporting member, and Cochrane said it was not a good way to coordinate the two contracts, that if they put up these triangular structural pieces it would mean a large expenditure of money, and that they, the paving company, intended to put up falsework to support their runways from which they would

pour their concrete; that they had a discussion as to getting the job coordinated because the paving company was trying to get the best price it could. (Tr. pp. 375, 376.) After this conference with Cochrane he, Soule, refigured his estimates, and on December 9th Stevens flew down from Seattle and went over the estimates and they pared their estimate down to $28.60 a ton, that they then took out the amount they had calculated for the supporting means, which was $3.70 a ton, which made $24.83; they then dropped the 3¢ and made an estimate price of $24.80 a ton. On December 11, two days later, Soule dictated in letter form, a proposed memorandum of contract with the paving company. (Tr. p. 377.) Soule and Dowling went up to the job site on December 20th or 21st and Soule's recollection is that on the train he gave Dowling a copy of this proposal. (379.)

Approximately a week later, on December 29, 1940, Soule, Stevens, Dowling and Cochrane met at Soule's office about 8 o'clock in the morning.

> "A. We had a short talk in my office, and then we proceeded upstairs to the engineering department, to discuss the method of the falsework which the Union Paving Company said that they were going to use for their own use, that they were required to build, which they would have runways on, and on which the workmen would wheel their wheelbarrows and pour the concrete. That was the principal subject and reason for the visit, for that discussion.
>
> Q. You mean up to the drafting room?

A. Went up to what we call the reinforcing engineering department.

Q. This map that you identify here, was that before you at the time, Mr. Soule?

A. We took this original plan showing the outline of the pier, and Mr. Alec Cochrane proceeded to tell me how he was going to build this inside falsework. I took the T-square and a triangle, and as he proceeded to tell me how he was going to do this, I put down the work in here. He said, 'I would use a 10 by 10 with about 10 foot centers'. And as he would tell me, then I would put down that work.

He told me about the pouring, of the elevations at which it would be required on account of the pouring. The specifications said in instances of big bulk work, in order that the concrete might not heat up too much, and so forth, that you had to limit them to five-foot pours.

We discussed very thoroughly the places at which each of the bars would splice, and, of course, we had to stop the pour at a workman's height in order to weld those bars. That could not be done down on their stomachs; they could be higher, but it would not be very economical. And a discussion was held as to the different welding points. This shows at all the elevations where they had to be welded, so therefore you had to stop the pouring at different places. For example, this bar came down and was broken there. Of necessity, you would have to stop the pour there. These beams came in at this elevation, and here are red marks showing the different elevations at which the pours of necessity have stopped for construction purposes.

Q. Did all this conference take place in the presence of Mr. Dowling?

A. Mr. Dowling was present at all times.

I remember Mr. Cochrane stating to us, after we had this all delineated out there and they were leading up to the subject of the price at which we would quote on this work—and I remember that Mr. Cochrane remarked, 'Now, boys, it looks like a different picture to you now, doesn't it, that you know the type of falsework that we are going to construct for our own use?'

And then he went on to state that this falsework is to be for the use of ourselves in the pouring of the concrete, supporting these runways, and stated to us that he would in all instances turn this over to us for our own use. The explanation seemed to be very clear to us.

A. To lunch, down to Mannings' on Brannan street. When we came back we went up there and had a further discussion over the points that were brought out in the morning, and further, Mr. Cochrane explained to us after they built this inside framework, if there was any templating required, that is, if you had to bring the bars out to the exact tolerances as shown on the plans, that should be for our own account. If after they did the bracing, did the construction of this work and did the bracing, and, in our judgment, that bracing was not sufficiently strong—for example, if we desired to put more bars on one side than we did on the other for an unbalancing, then if there was any extra bracing, then that should be for our account.

Q. That was all discussed at that time?

A. We had a full and complete discussion, and present at that meeting was Mr. Dowling, Mr. Cochrane, Mr. Stevens and myself, and in the room, the engineering room, was Mr. Short, Houden, Ubigau.

Q. After you went up to the drafting room again what then happened, Mr. Soule?

A. After we had a full explanation as to how this was to be done, Mr. Dowling remarked, 'Now, boys, you get your figures together on this explanation as we have shown it to you, and we will turn this over to you free of charge for your use in all instances, and Alec and I will take a walk out here and look over the housing project.'

They were gone about an hour, and when they came back we went into my room, in the corner, downstairs, and Mr. Dowling said, 'Well, now, boys, have you got that price down? What is your final price?'

And Mr. Stevens and I had again looked over our estimate in light of the explanations of their furnishing the falsework, and that estimate in the file shows we calculated, we came to $23.60 on the basis that the Union Paving Company would furnish the falsework. We felt that we would try to get $24, so when Mr. Dowling came back and asked us for a price, we started at $24.

Q. What price did he offer?

A. Mr. Dowling offered us a price of $21.50 to $22. Finally, some horse trading went on between us, until Mr. Dowling's price had raised to $22.25, and our price had lowered to $22.75, and it looked like we were just in a complete deadlock, because we had dropped below our $23.60 price. And Mr. Stevens and I had agreed we thought we were get-

ting down to as low as we should possibly go on such a hazardous job. Finally, Mr. Stevens and Mr. Cochrane, who were sitting a little bit to the back of us—Mr. Cochrane suggested, 'Why don't we split the difference?' We split the difference, and that became the basis of our bid of $22.50 a ton.

Q. At that meeting did you have a copy of this bid of December 11th?

A. I did.

Q. I will hand you one. There are certain pencil interlineations in there. Whose handwriting are those in?

A. That is in my handwriting.

Q. You saw the one that was introduced in court this morning, produced by Mr. Dowling?

A. Yes, sir.

Q. That is in your handwriting, too, is it?

A. That is a duplicate of this one.

Q. Under what circumstances was that handwriting placed on that document?

A. In other contracts it was usual that we get out the contract, and I suggested that we prepare the contract, believing that the form that we generally had there covered the conditions. Mr. Dowling said he wanted to get out the contract. So I therefore took one of these copies, and I know this was my particular copy—I scratched out the $24.80, and I put on the things that we had agreed to. Paragraph 5 states,

'You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers, or a wooden trestle which may be for our use.' Paragraph 8:

'You are to furnish wood supporting frame work.'

Q. That was put in there by you, was it?

A. That was put in there by me.

Q. On the back there is a 7.

A. 7 couldn't be written in that part on account of the space. 7 was turned over to read,

'You are to pour concrete sills as required, in the base of the piers, to support the reinforcing steel mats in the bottom of the piers. On the steel reinforcing mats, the steel shoes, which support the two-inch vertical bars, are to be placed.'

Q. Were those various provisions discussed between you and Mr. Dowling at the time you made those interlineations?

A. They were. It was brought right up to date and agreed to right at the time.

Mr. Wrigley. I ask that that statement, that it was brought up to date, be stricken out.

Mr. Moore. It may go out.

Mr. Wrigley. In other words, he can say what was said, but his conclusion that it was agreed to——

Mr. Moore. I made no objection to its going out.

Q. Mr. Soule, you kept one copy of that, did you?

A. Yes, this was to be the basis of the contract.

Q. Mr. Dowling took the other?

A. That is correct.

Q. He drew up the contract?

A. Yes, sir.

Q. You signed that contract when?

A. January 6th.

Q. Was it your understanding at the time you signed that contract that you were to put up the framework, or that Soule was to put it up, or that the Union Paving Company were to put it up?

Mr. Wrigley. It calls for an opinion and conclusion when you ask for his understanding.

Mr. Moore. I think it is proper to show his understanding as to what the contract meant at that time, your Honor.

The Court. I will allow it.

A. I distinctly understood, and it was so stipulated on this written form, that they were to furnish it, and we reduced the price from $28.60 by deducting the amount to $24.80 and horse trading to $22.50." (Tr. pp. 380, 381, 382, 383, 384, 385, 386, 387.)

Soule's copy of the letter of December 11th was admitted in evidence. (Ex. 23, 388, 390.) Dowling's copy of the letter (Ex. 21, 324-326) is printed at pages 39 to 41 of appellants' brief. Later when we comment on these two letters as showing a complete and full meeting of the minds and understanding, we will insert photographic copies of these two letters. It is sufficient at this point to note that in paragraph seven of this letter, in Soule's handwriting is the provision "you are to furnish wood supporting framework". On cross-examination Soule's attention was drawn to the fact that the written contract prepared by Dowling and signed on January 6, 1940 did not contain this provision.

"Q. And there is totally omitted from this contract your wording as to the wooden framework; that is all omitted from here, isn't it?

A. Oh, it did go on to say that you shall make ready those piers, and that is the part that I construed as to the furnishing of this falsework. When you make this ready and have done these things which you have agreed to on here and have built this there, it is then made ready to receive the reinforcement bars, so that the two are synonymous in my understanding." (Tr. p. 402.)

This testimony amply supports the trial court's finding heretofore quoted, that the clause of the contract requiring the paving company to make the sections of the piers and abutments ready for placement meant that they were to erect the interior framework and permit Soule to use it without cost.

(2) TESTIMONY OF STEVENS (469-476), COCHRANE (476-482).

We do not consider it necessary to detail the testimony of these two witnesses, but consider it sufficient to say that they fully corroborate Soule, particularly in regard to the conference of December 29, 1939.

(3) TESTIMONY OF DOWLING.

Dowling's deposition was taken prior to the trial. At the time of the court's ruling—Dowling was on the witness stand, but Soule, Stevens and Cochrane had not as yet testified.

Dowling admitted that a meeting took place in the drafting room at which Soule, Stevens and Cochrane were present, but places the date of the meeting approximately a month and a half prior to December

29, namely, on November 17 or 18. (323.) He likewise admits that at the meeting a sketch of the interior framework was made, but states it was made by a Mr. Gorman and not by Soule, and denies that Exhibit 22 was used. (320-321.) He denies that any of the terms of the proposed contract were discussed. (320-321.) He thus corroborates Soule, Stevens and Cochrane to the extent that a sketch of the interior framework was made, but otherwise he denies in toto their testimony. He stated that he received a copy of the letter of December 11, 1939 about the date which it bears (322) but says the pencil memorandum was not on it at the time of its receipt, and was not put on in the presence of either Cochrane or Stevens, but was inserted by Soule when Soule came to his office on January 6, 1940 at the time of the closing of the contract. He says the interlineations were written in after the closing of the contract (323), but he then reverses himself and says they were made prior to the making of the contract. (327.) According to Dowling the contract was drawn before he got the letter (327), but he then says the interlineations were put on the letter before the contract was signed. (328.) A reading of Dowling's testimony (320-329) shows it was impossible to get a direct answer out of him. The interrogator was met with evasion or argument.

After listening to Soule, Stevens and Cochrane's testimony Dowling returned to the witness stand and changed his previous testimony. He says that he did not receive the letter on December 11th, but that

Soule came to his office on January 6th with the letter and that the interlineations were put on at that time. (512-513.) His deposition was then opened (514) wherein he testified that Soule had brought in this letter on December 11th and the interlineations were made at that time, and were discussed between him and Soule. (516-7.) We thus have three versions from Dowling; first, that the letter was received by him on December 11th and the interlineations made on January 6th; next, that the letter was received on January 6th and the interlineations made on the same date; and, finally, by deposition, the letter was received on December 11th and the interlineations made on that date. In his deposition he testified that all of the provisions of the letter were discussed, admitting that the clause "you are to furnish wood supporting framework" was written into the letter after discussion between himself and Soule and after it had been agreed to by himself. (518.) On the witness stand he asked to be relieved of his previous testimony and asked the privilege of changing it to the effect that the letter was not delivered on December 11th but delivered on January 6th (516), yet he affirmed that the clause relative to the interior framework was discussed, stating that the testimony given in his deposition was true. (519.) Furthermore Dowling testified that in drafting the contract he used the government specifications alone (329), yet a comparison of the clauses of the contract and the provisions of the letter show that many of the provisions of the letter were copied verbatim into the

contract (516-519), thereby demonstrating that the letter was used as one of the basis of the contract.

No coherent account can be obtained from Dowling as to what actually occurred prior to and at the time of the signing of the contract. Nowhere in his testimony does it appear between whom, nor where, nor when the minds of the parties met. We do not find out how the price of $22.50 a ton was decided on, nor how other vital understandings were reached. The comparison of the clauses of the formal contract with the clauses in the letter conclusively show that the interlined letter was used as one of the basis on the contract, yet we search in vain through Dowling's testimony for any clear and concise statement as to when or under what circumstances he received his copy of the letter, or under what circumstances the interlineations were placed thereon by Soule. His contradictions and evasion on this crucial subject are significant.

D.

ARGUMENT.

For the purpose of illustrating that both letters are identical both as to the typewriting and as to the pencil interlineations, we are attaching in addenda photographic copies of Ex. 21 produced by Dowling, and Ex. 23 produced by Soule, in both of which there appears in Soule's handwriting "you are to furnish wood supporting framework". If the interlineations found in these letters were made under the circum-

stances related by Soule (corroborated by Stevens and Cochrane) and Dowling's copy was delivered to him for the purpose of drawing the contract, the case which is presented is so strong that if the final contract was contrary to these express understandings of the parties as conclusively evidenced by these letters, then a court of equity would be compelled to revise the contract. Judge Roche's findings, not only because of the conflict of the evidence rule, but because of the type and character of testimony, should not be disturbed. Dowling drew the contract, placed a provision therein which he knew Soule would believe expressed the oral understanding of the parties, performed in accordance with Soule's understanding in that the paving company made no objections to and paid Soule's monthly billings, made no demands upon Soule, until the job was about half completed, when the time was ripe to force Soule, by withholding progress payments, to assume (contrary to the contract) a portion of the paving company's obligations.

The rule relating to the admission of extraneous facts to assist in the construction of a contract is universal. We will therefore confine ourselves to the text of 17 C.J.S., pages 744 to 750.

> "In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction, it may and should be construed in the light of the circumstances surrounding them at the time it is made, it being the right and duty of the court to place itself as nearly as may be in the situation of the par-

ties at the time so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and the correct application of the language of the contract. For this purpose in construing a contract the court will consider the nature of the agreement itself, together with all the facts and circumstances leading up to and attending its execution, the relation and condition of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. The contract, or particular parts thereof, must be so construed as to harmonize with, and give effect to, such purpose, if possible. This rule does not apply, however, where the language of the contract leaves no doubt as to the meaning of the parties and in such a case the contract is to be construed without regard to extraneous facts."

* * * * * * *

"Where preliminary negotiations are consummated by a written agreement, or an oral contract is evidenced by a subsequent agreed memorandum in writing, the writing supersedes all previous understandings, and the intent of the parties must be ascertained therefrom. *In case of doubt as to its meaning, however, all the negotiations between the parties ought to be considered in giving a contract a construction.* Also, a final contract and a proposal may be construed together where they refer to and supplement each other, especially where the parties admit that the contract substantially conforms to the proposal; and in construing a written contract which superseded a prior written contract between the parties, the two contracts may be com-

pared in order to ascertain the situation of the parties when the second contract was made."

California is in accord with the general rule, as shown by the text in 6 Cal. Jur. at pages 294-298, and particularly 297.

California cases which hold that evidence of preliminary negotiations are admissible are:

Balfour v. Fresno C. & I. Co., 109 Cal. 221;
Pearsall v. Henry, 153 Cal. 314 at 329;
Joy v. Rousseau, 72 Cal. App. 179;
Crawford v. France, 219 Cal. 439.

A late California case which also contains an excellent summary of the earlier cases relative to the rules of interpretation followed in California, and which particularly states that the construction given to a contract by the acts and conduct of the parties before any controversy has arisen, is entitled to great weight and will be adopted and enforced, is *Universal Sales Corp. v. Cal. etc. Mfg. Co.,* 20 Cal. (2d) 751.

Another late California case which bears a striking similarity on the facts—in that, the contractor rendered bills according to the understanding of the other party, then when the work was three-quarters finished, changed his billing and contended for a different interpretation, is *Johnstone v. Joint Highway Dist.,* 138 Cal. App. 450.

REPLY TO POINT TWO.

We do not understand appellants' argument (App. Br. p. 28) but apparently it has to do with the cost of installing certain spacers, stiffeners, and templates. Not only do no figures appear therein which can be identified as the cost of these spacers, stiffeners and templates, but due to the position which appellants maintained in the trial court, no figures could possibly be produced. By cross-complaint appellants claim that they had performed certain work which Soule was obligated to perform and that the cost of this work amounted to $61,112.62. (Ex. Y.) The burden of proof was therefore upon the cross-complainant. No evidence was introduced as to what spacers, stiffeners, or templates the defendant installed, appellants taking the position, at the conclusion of the case (523-524), that the burden of proof laid upon the steel company. The trial judge asked defendant's counsel what they claimed the cost of the spacers, stiffeners and templates were which they claimed to have installed. Counsel replied that it had never been shown, after which the court asked counsel if they had not produced the evidence how did they expect him to determine it, to which the reply was made that the burden was on the plaintiff. Undoubtedly defendant was wrong, but even assuming that the burden of proof laid upon the plaintiff, nevertheless, it fulfilled this burden. Stevens, as stated by appellants (App. Br. 28) testified that the spacers, stiffeners and templates were used to support the steel, but what counsel

neglected to mention, is that, Stevens also testified (424) that the Soule Company installed these spacers, stiffeners and templates and paid for them.

REPLY TO POINT THREE.

Appellants have devoted all of point three of their brief to the establishment of the proposition—that when Union notified the steel company that it was expected to pay a portion of the costs of the falsework and framework, that Soule should have rescinded the contract, gotten off the job and sued Union for damages, yet they say

> "or (2) It might have proceeded with the contract and advised the Union Co. it intended to complete the contract, *reserving its right to claim damages on the completion of the contract*".

Nowhere else in their brief is there to be found any explanation of what is meant by the foregoing statement. Actually Soule did proceed with the contract and is now suing for damages, in the sense, that after completing performance he is suing for the contract price. Frankly, we cannot decipher or understand appellants' argument, for if they admit that Soule had two options as to his future course of conduct, and that he exercised one of them, what bearing on the problem does the fact that he did not exercise the alternative option have, or in what way does it effect the present cause of action? However, in order to expose the fallacy of appellants' reasoning

it is necessary to review their arguments and the authority cited relative to the question of rescission.

When Union breached its contract by refusing to make the monthly payments then unquestionably Soule had the right to quit the job, treat the nonpayment by Union as a rescission of the contract and sue in *quantum meruit* for a reasonable value of the services rendered. If the steel company had pursued this course of conduct it would have had to rescind promptly and the rule of law referred to in the California Civil Code and in the California cases cited at App. Br. page 31 would have been applicable, but Soule did not pursue this course, but stayed on the job, continued to perform the contract in the manner in which he understood it by placing the required amount of reinforcing steel. Since the steel company did not rescind the contract the authorities cited relative to prompt rescission have no bearing.

Although the paving company admits as previously stated that the steel company might have proceeded with the contract, reserving its rights to claim damages on the completion of the contract, yet, nevertheless it apparently reverses itself and takes the position that the steel company did not have this option but had to quit the job and rescind the contract whether it wanted to or not.

If a contractor quits the job, and if for any reason he is not justified in so doing he lays himself liable to heavy damages. The Six Companies pursued this course in the case cited by the defendants. (*Six Companies v. Joint Highway District No. 13,* 110 Fed.

(2d) 620.) In that case, due to many difficulties such as swelling ground and cave-ins the Six Companies was greatly delayed and was granted various extensions of time, but finally the District deducted from an installment payment some $3500.00 claimed by the District as liquidated damages for delay at the rate of $500.00 per day. The Six Companies thereupon quit, immediately rescinding the contract on three grounds: (a) That the retention of the liquidated damages by the District was a material breach of the contract, (b) that the District had misrepresented the nature of the ground through which the tunnels were to be driven, and (c) that the District had rescinded the contract by refusing to perform the laying out of certain lines and grades. At the time that the Six Companies quit it was some twenty days behind in the work. The trial court, affirmed by the Circuit Court of Appeal, held—that under the terms of the contract the Six Companies was not justified in quitting, and therefore allowed the District on its cross-complaint $142,000.00 as liquidated damages for the delay of two hundred and eighty-four days, of which, as will be noted, two hundred and sixty-four days occurred after the Six Companies had quit; $69,001.85 covering interim expenses paid by the District in protecting and insuring the work and advertising for new bids; and $98,066.31 representing the completion costs in excess of the Six Companies' bid; or total damages in excess of $309,000.00.

Soule Steel Company faced identically the same situation which the Six Companies faced. The Master

Contract carried a provision for heavy liquidated damages for delay. Soule Steel Company's quitting would undoubtedly have caused a serious delay in the progress of the work, because the Union Paving Co. would have either to have secured equipment and organized a crew to take over the placing of the reinforcing steel, or would have had to secure a new sub-contractor. This would have taken time, and the same as in the Six Companies case, interim expenses would probably have been incurred by the Union Paving Co. in protecting and insuring the work and advertising for new bids. Also completion costs in excess of the contract price might have accrued. The defendants now say that this was the only course open to the Soule Steel Company; in other words, they say that because the Union Paving Co. breached its contract that such breach automatically forced the Soule Steel Company to rescind and that they could not continue to comply with and perform their contract to its completion and recover the contract price.

Neither of the other two Federal cases cited support the defendants' contentions.

In *Wenzel & Henoch Const. Co. v. Metropolitan Water District,* 115 Fed. (2d) 25, the construction company entered into a contract with the District to construct a tunnel. Due to swelling ground and other reasons the construction company was far behind the schedule of completion, and the District, under a provision of the contract, took over a portion of the job. The construction company tried to pre-

vent the District from taking over, and even brought a suit for specific performance of the contract to require that possession of the tunnel be restored to it. This suit was dismissed. The construction company subsequently brought another action on three counts: (a) damages for breach of express contract, (b) *quantum meruit* for value of materials furnished and work done independent of the express contract, and (c) money had and received. In regard to the count on the contract, the Circuit Court held that under the terms of the contract the District had the right to take over the job and therefore its taking over did not breach the contract so as to create a cause of action in favor of the construction company. On the question of the recovery under *quantum meruit,* the court held that although under the California law a contractor has the right to rescind upon the non-payment of an installment and sue on *quantum meruit,* that the rescission must be made promptly, and that not only did the construction company not elect to rescind, but actually had brought an action for specific performance of the contract. It will be noted that this case is the reverse of the present case in that the court held that the construction company had breached the terms of the contract and that therefore the District was justified in taking over the work; while here the breach was on the part of the employer and not on the part of the contractor. This decision does not hold nor purport to hold that a contractor's sole remedy is to rescind and sue for damages.

The case of the *City and County of San Francisco v. Transbay Construction Company,* 134 Fed. (2d)

468, is strong authority against the defendants and in our favor. In that case the contract was for the elevation of the O'Shaughnessy Dam, and the contract provided for excavation which was estimated at 30,000 cubic yards at $2.75 per yard. It ultimately developed that 84,000 cubic yards had to be removed. The performance of the contract was delayed for approximately one year due to the increased amount of excavation, and also to the vacillating behavior of the city engineers. The contractor was paid for the increased yardage at the contract price of $2.75 per yard, but claimed that it had suffered damages by reason of the delay caused by the city in that it had to expend some $386,000.00 in extra costs in the maintenance of its plant and equipment and in such items as interest, insurance, overhead, maintenance of roads, etc. The complaint contained three counts. The court states the first cause of action was predicated on the theory of breach of contract for the extra expense, whereas the second and third were predicated on a quasi or implied contract on the notion that the express contract had been abrogated or rescinded. The trial court denied judgment on the first count on the ground that no claim had been presented to the city within sixty days as required by the city charter, but felt the contract should be abrogated because of the delay. The Circuit Court of Appeals on the contrary held that a suit for *quantum meruit* only arises where a contract is rescinded, and states that the Transbay might have treated the contract as rescinded but that it did not do this, and also that it would have

had to rescind promptly which it did not do. The Circuit Court says:

> "But we agree with Transbay that this was not the only course it might take without waiver of its rights. It might, we think, elect to proceed with the contract, advising the city of its election and reserving its right to claim damages for the unjustifiable delays suffered at the hands of the city."

The court further continues:

> "But having proceeded with the contract, Transbay was not thereafter at liberty to treat it as nonexistent and recover for the entire job on a cost plus basis."

It will thus be observed that this case clearly recognizes that a contractor has an election of remedies where he claims that a breach has occurred upon the part of the employer, namely: He can either elect to rescind the contract and sue for the reasonable value of labor and materials, or proceed with the contract and reserve its right to claim damages. This view is borne out by many other authorities to which we will briefly refer.

We desire to call the court's attention that this is exactly what Soule Steel Company did, except that it makes no claim for damages, but asks that it be paid the contract price. The Soule Steel Company (as recognized by the Transbay case) elected to proceed with the contract regardless of whether or not the Union Paving Co. made the installment payments required of it under the contract, and at the comple-

tion of the contract and the acceptance of the work by the United States Government under the Master Contract, Soule Steel Company brought suit for the contract price. Nothing in any decision referred to by the appellants indicates in the slightest way that Soule did not have a perfect right to pursue the exact course which it did, and in fact, the Transbay case recognizes the propriety of pursuing such a course.

In effect, defendants argue—that if a contractor fails to make a progress payment that the only course of action which the subcontractor can pursue is to rescind the contract and quit the job. If this postulate is sound then the rescission automatically follows the non-payment, and it is the non-payment which creates the rescission and not the action or non-action by the subcontractor, which would mean—that a contractor could at any time cancel or terminate the agreement of the parties by simply failing to make a progress payment. That no such doctrine exists is easily demonstrated. In *Bank of America etc. Association v. Moore,* 18 Cal. App. (2d) 522, a lease contained a provision that if the lessee fails, neglects or refuses to pay the rent for a period of ten days, the lease "Shall thereupon become and be null and void" and all rights of the lessee "shall be forfeited and ended". Under this express provision in the lease, the assignee of the lessee claimed that it gave him the option to drop the burden of the lease whenever he so desired. The court after a very lengthy citation of authorities unequivocally held that such provision was inserted for the benefit of the lessor, and the

failure to pay the rent does not void the lease except at the option of the lessor. The same reasoning must of necessity apply to construction contracts, in that although the law permits a subcontractor to rescind a contract upon the non-payment of a progress billing that this right of termination is for the benefit of the subcontractor which he may, at his option, avail himself of, but does not have to. The decisions bear this out. One of the leading cases in America is the California case of *McConnell v. Corona City Water Co.,* 149 Cal. 60, the language from which is quoted as the text in 6 *R. C. L.,* page 1032. In the *McConnell* case, the contractor agreed to construct a tunnel. Through the fault of the owner in furnishing defective timber and the mistake of the engineers as to the strength of the timber required, the tunnel caved in. The contractor regarded the contract as terminated. The court said:

> "One who has been injured by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In this last case the contract would be continued in force for that purpose. (7 *Am. & Eng. Ency. of Law,* 2d Ed., p.

152; *Fountain v. Semi-Tropic L. and W. Co.,* 99 Cal. 680 [34 Pac. 497].)"

McConnell v. Corona City Water Co., 149 Cal. 60, at 64-65.

The language of the court in the *McConnell* case is quoted verbatim as the authority for the decisions in the later California cases of *Sobelman v. Maier,* 203 Cal. 1; *O'Connell v. Federal Outfitting Co.,* 5 Cal. App. (2d) 327; *King Features etc. v. K.M.T.R. etc. Corp.,* 29 Cal. App. (2d) 247; and *Dyer Bros. G.W.I. Wks. v. Central I. Wks.,* 72 Cal. App. 202.

Many decisions in other states hold that one party to a contract by refusing to perform, cannot compel the other party to rescind it. We will refer to two of them.

"In *John A. Roebling's Sons' Co. v. Lock-Stitch Fence Co.,* 130 Ill. 660, 22 N.E. 518, it was said: 'Where one party to a contract gives notice before the time of performance arrives that he does not intend to perform, the other party may treat such notice as a breach and bring his action, or he may decline to accept such notice as a breach, and may insist that the contract shall continue in force up to the time fixed for its final performance, holding the party refusing to perform responsible for the consequences of such refusal. One party to a contract cannot, by simply refusing to carry out his part of it, compel the other party to rescind it. The latter has a right to keep it alive notwithstanding such refusal.' "

"In *Indiana L. Endowment Co. v. Carnithan* (Ind.), 109 N. E. 851, the court said: '* * * The

> authorities also emphasize the fact that one party to such a contract may not by himself rescind it, and that a repudiation by him alone, although absolute and sufficient to justify the other party in treating it as an anticipatory breach, does not necessitate such action by the latter party, but the latter party may elect to stand upon his contract and perform, or offer to perform, all the conditions thereof required of him, and then, when the day of performance arrives, proceed to enforce his contract.' "

See also the decision in the *United States Press Association v. National Newspaper Association,* 227 Fed. 193, which is to the same effect, wherein a considerable number of authorities are quoted from.

CONCLUSION.

We therefore submit:

1. That the plaintiff is in error in its claim that the contract was unambiguous and that the trial court erred in admitting parol testimony of the preliminary negotiations.

2. That findings VIII and IX (pp. 51 to 56) relating to the interpretation of the contract are supported and justified by the evidence.

3. That appellants are not entitled to any credit for stiffeners, spacers or templates.

4. That the steel company was not compelled to quit the job and rescind the contract, but it could and

did in good faith continue the performance of the contract to its completion, and

5. That, therefore, it is entitled to an affirmation of the judgment.

Dated, San Francisco,
April 17, 1944.

Respectfully submitted,
THELEN & MARRIN,
COURTNEY L. MOORE,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

LOS ANGELES
PORTLAND
HOUSTON

TELEPHONE
VALENCIA 4141

U. S. DIST. CT. N. D. CAL.
No. 22308 R
Plf. EX. No. 21
FILED
12-15-43
WALTER B. MALING, CLERK
BY ..... Deputy Clerk

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
SEP 2 8 1943
PAUL P. O'BRIEN
CLERK

SOULÉ STEEL COMPANY

IRON AND STEEL PRODUCTS

1750 ARMY STREET, SAN FRANCISCO

PLFF'S EXH. No. 12

Frank L. Hart
REPORTER

December 11, 1939

Gentlemen: Re: Abutments and Piers, Pit River Bridge Relocation of Southern Pacific Railway and U. S. Highway 99

In regard to the labor of installing the reinforcing steel bars, Bid item No. 11, as specified for the construction of the above project in accordance with plans and specifications prepared by the United States Department of the Interior, Bureau of Reclamation, we are pleased to quote you as follows:

1. We are to receive the reinforcing steel bars f. o. b. cars Redding, California.

2. The 2" square bars are to be bent at supplier's mill, all other bars are to be furnished in straight lengths.

3. We are to be responsible for the unloading, checking and handling of said reinforcing steel upon arrival at Redding upon a lot to be provided by you. ~~(We estimate the storage lot size should be about 150' x 350' and adjoining a rail track.)~~ the size of which shall not exceed 30,000 lbs per month.

4. We will do the cutting, bending and shaping of 2" bars preparatory to welding, loading on to trucks and transporting to jobsite to conform to your construction schedule.

5. You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers, [illegible] wooden [illegible] which [illegible] may be [illegible]

6. We will furnish all labor (including insurance) to do the placing of the reinforcing steel, including tie wire and accessories under above bid item No. 11 (but not including welding).

7. You ~~will pour concrete "pyramids"~~ in the base of piers #1, 2, 3, 4, 5, 6 and 7 and/or will furnish and erect wood core forms and/or steel supports, against which the 2" bars can be supported.

~~8. We have provided in this proposal for a job engineer 16 months @ $500.00 per month, which cost will be borne equally.~~

9. Sufficient lights will be furnished by you; also power outlets will be available for our use.

PRICE: As specified for the above items, the unit price of $24.00 per ton.

Sheet #3

If a bond is required, the same will be for your account.

PAYMENTS are to be made on or about the 10th of the following month for 85% of the value of the work performed during the preceding calendar month, and the remaining 15% to be paid 30 days after completion of our portion of the work.

NOTE: We are not to be held responsible for failure by delay or default arising from strikes, lockouts or other contingencies beyond our control.

If the above is in accordance with your understanding, please accept in the lower left hand corner, and it will constitute an agreement between us.

Sincerely yours,

SOULE' STEEL COMPANY

By

Edw. L. Soule'

Accepted:

UNION PAVING COMPANY

By

(7) You are to pour concrete "sills" as required, in the base of the piers to support the reinforcing steel mats in the bottom of the piers. On the steel reinforcing mats, the steel shoes, which support the 2" vertical bars, are to be placed

ELS:DL

LOS ANGELES
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3. We are to be responsible for the unloading, checking and handling of said reinforcing steel upon arrival at Redding upon a lot to be provided by ~~you~~ us. (We estimate the storage lot size should be about 150' x 350' and adjoining a rail track.)

4. We will do the cutting, bending and shaping of 2" bars preparatory to welding, loading on to trucks and transporting to jobsite to conform to your construction schedule.

5. You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers, ~~or~~ a wooden trestle which may be for our use.

6. We will furnish all labor (including insurance) to do the placing of the reinforcing steel, including tie wire and accessories under above bid item No. 11 (but not including welding).

7. ~~You will pour concrete "pyramids"~~ in the base of piers #1, 2, 3, 4, 5, 6 and 7 and/or will furnish and erect wood core forms and/or steel supports, against which the 2" bars can be supported.

8. ~~We have provided in this proposal for a job engineer 16 months @ $300.00 per month, which cost will be borne equally.~~

9. Sufficient lights will be furnished by you; also power outlets will be available for our use.

PRICE: As specified for the above items, the unit price of ~~$45.00~~ per ton.

Sheet #3

~~If a bond is required, the same will be for your account.~~

PAYMENTS are to be made on or about the 10th of the following month for 85% of the value of the work performed during the preceding calendar month, and the remaining 15% to be paid 30 days after completion of our portion of the work.

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By
Edw. L. Soule'

Accepted:

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ELS:DL

(7) You are to form concrete "pills" as required, in the base of the piers to support the reinforcing steel rests in the bottom of the piers. On the steel reinforcing rests the steel shoes, which support the 2" vertical bars, are to be placed.

Due service and receipt of a copy of the within is hereby admitted

this.....day of April, 1944.

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Attorneys for Appellants.